Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Leased Commercial Access	)	MB Docket No. 07-42
	)	
Development of Competition and	)	
Diversity in Video Programming	)	
Distribution and Carriage	)	
	)	
	)	

To: The Commission

COMMENTS OF Charles H. "Charlie" Stogner, President, LAPA

These comments are submitted on behalf of Charles Stogner, in his role as President of the Leased Access Producers Association ("LAPA").

LAPA serves as a national trade association to promote the interests of video producers using, or wanting to use, leased access cable TV for the distribution of their programming. Voting membership is open to all persons who use or want to use leased access and associate membership is available to equipment suppliers, attorneys, government officials, cable companies and other persons/entities who do business with or have an interest in leased access video production. Our goal is to promote the use of leased access cable TV, encourage and work with the FCC to develop specific rules and regulations concerning the obligations cable TV companies have in carrying

out the mandate of Congress to provide a 'genuine outlet' for leased access programming to promote choice, diversity and competition which is beneficial to the public interest. LAPA also attempts to work with the cable companies to resolve problems that arise from programmers exercising the right to leased access as mandated by Congress.

LAPA is concerned about a number of issues including accessibility; channel/tier placement; coverage areas by targeted zone, insurance requirements; rates; contracts; methods of delivering programming to the cable companies; expense of technical support; competition from cable site's own local origination channels, and FCC's apparent support of cable sites forcing leased access users to accept unreasonable terms and conditions (some even not allowed by the law) and lack of specific rules and remedies that leased access users can operate under--especially when cable companies throw roadblocks in the way.

First and foremost leased access producers must be able to sustain a financially feasible business. Cable companies control the distribution of their programming and advertising/revenue stream. Leased access producers are at the mercy of the cable companies in making sure the programming is distributed/aired as schedule, terms of the contracts and whether the cable company will impose new requirements or terms, change channel placement, etc. The more roadblocks, obstructions and hoops to jump through that a

cable company imposes, makes it more difficult to operate as a business. But leaving certain issues up in the air, to be decided through legal action, also places an unreasonable burden on leased access producers as many do not have the deep pockets to litigate or can wait until the Commission takes action on an issue.

The FCC should write clear and concise rules and regulations (perhaps in a manner like that done for other FCC regulated telecommunications such as CLECs) that the cable companies must follow in providing leased access and the penalties which may occur for infraction of these rules. The FCC should minimize litigation; have the staff fully investigate any 'petitions for relief' and not simply dismiss them on a 'procedural' basis and provide for a method of arbitration if needed.

There are enough burdens that leased access users must bear. One is the issue of insurance. There is no insurance company underwriting a policy tailored towards the needs of the leased access producers. One must get an expensive "broadcaster's liability" or "Media Perils" policy and usually have to explain this to some the insurance agent since very few know about leased access. I can only echo LAPA VP Duane Polich in saying, "it seems that this is a requirement that the cable company uses more to discourage potential leased access users, then an actual need of the cable company." Has there been an instance where the cable company was harmed by a leased access

user and needed to be compensated by the insurance? This especially places a burden on the small user, who only wants to use a small amount of time. The cost of insurance for the small user is likely the same as one who leases on a full time basis. Our association research resulted in LAPA begin told by the only known underwriter of "Media Perils" insurance that this does not cover legal actions based on 'obscene and/or lewd' content yet FCC seems to base support for allowing cable operators to demand this specialized coverage on the remote possibility someone sues the cable site over this type content in a leased access show. There doesn't appear to be any record of such an occurrence and the only records we find of programmers being penalized for 'obscene and/or lewd' content has been when this is done by FCC on the producer/owner of the show; not the cable site that the show is viewed on.

There is considerable evidence in published FCC material that states leased access users should have access to the BST or CST tiers unless otherwise requested.

Note: Sec. 76.971 *Commercial leased access terms and conditions.*

(a)(1) Cable operators shall place leased access programmers that request

access to a tier ***actually used by most subscribers*** *on any tier that has a subscriber penetration of more than 50 percent, unless there are technical*

*or other compelling reasons for denying access to such tiers. (**Emphasis added.**)*

Additional evidence from our research shows the following comment: (…"genuine outlet" for their programming. According to the legislative history of the 1992 amendments to Section 612, the Commission should ensure that *programmers are carried on channel locations that "most subscribers actually use,")* LAPA suggests FCC review the Second where it states: 83. "*According to the legislative history of the 1992 amendments to Section 612, the purpose of leased access would be defeated if leased access programmers were placed on tiers that few subscribers access. The 1992 Senate Report states that "[t]he FCC should ensure that [leased access] programmers are carried on channel locations that most subscribers actually use." It further states that "it is vital that the FCC use its authority to ensure that these channels are a genuine outlet for programmers." (**Emphasis added.**)*

84. In the Further Notice, the C**ommission tentatively concluded that leased access programmers are entitled to placement either on the BST or on the CPST with the highest subscriber penetration,** unless technical or other compelling reasons weigh against such placement.

The cable companies should minimize any channel change for leased access and give adequate notice (60 days) if a channel change is required for

technical or other valid reason to allow a leased access user to promote channel number and times of programming and operate in a consistent manner, so as to be able to develop an audience.

A leased access user should be able to reach targeted markets, especially in large markets where the cable company may have collapsed and consolidated several systems. When the cable company offers targeted zone ad insertion or local origination or PEG channels to a specific community within that metro area, then the cable company should offer leased access by zones or cities. The cable company should not require the leased access user to have to use the entire market in these situations. *(A case in point is where FCC upheld Time Warner in not allowing leased access usage in zones that previously was available prior to consolidation but later offered targeted zones to their own clients.)*

The subject of 'consolidation' brings to mind the Engles case (CSR 5601-L) and LAPA suggests FCC review this case and then share why this did not prompt FCC to offer assistance to Engle in how 'leased access' could be used to continue being on the sites. This would appear to have been a very good case to have used as basis for refining rules.

The leased access user should be able to enter into a standard contract with the cable companies in the area they serve. They should not be subject to the

'self-interest' of cable companies in setting use, rates, conditions and other requirements they often impose that outside the realm of the rules. LAPA encourages the FCC to adopt a standard contract form that the cable company must use with leased access users. ***(LAPA believes cable site's are forcing users to accept 'adhesion contracts' on a 'take it or leave it'—'our way or the highway' basis. These comments are accompanied by the documents presented as 'agreements' by a number of cable companies. We hope the Commission will instruct staff to carefully review these and then create a uniform document to be used by all sites.)*** The Commission should also develop a standard leased access information request form, which when submitted cause the info requested to be provided within the allotted time frame. Cable companies in the past have not provided info as requested, claiming the request wasn't properly worded. ***(Actually LAPA finds no evidence anywhere in the law or FCC rules that allows cable sites the privilege of requiring those seeking to exercise the right to leased access to submit the cable site's own 'application'.)***

LAPA believes FCC needs to adopt strict rules that insure all users are treated equally and the creation of a uniform document covering leased airtime could do this. An example that illustrates why there needs to be uniformity is in the comments filed by Erik Hutchins, Park City iNFO Channel states Comcast required them to *"sign a confidentiality agreement. This agreement specifically prevents us from disclosing what the 'inconsistencies' are in the Comcast definition of 'local'."*

This is a case FCC should re-visit to determine if Comcast unnecessarily cause Hutchins to go to great expense when FCC could have simply made the cable site follow the rules.

We are attaching the 'adhesion contracts' masqueraded as 'agreements' from Charter, Comcast, Cox, MediaCom, Time Warner and Vista III as well as copies of 'applications' from the following operators: BrightHouse, Charter, Comcast, Cox, MediaCom, Time Warner and Vista III. We hope the commissioners will instruct FCC staff to carefully review these and eliminate all unnecessary legal verbiage while creating an adopting a uniform document to be used by everyone in leased access.

One former multi-site user of leased access, Lorelei, repeated had a request for damages or for FCC to assess penalties on cable sites involved in 'petitions for relief' filed by Lorelei. In every case FCC refused and used a variety of reasons why. These ranged from—"*Finally, we decline to impose monetary and administrative sanctions in the instance case, because we believe in the first instance that Lorilei failed to establish the need for any such sanctions. Moreover, as noted above, because the leased access rules in effect at the time these matters initially arose were somewhat in flux and not completely familiar to most cable operators as well as to programmers, we believe it would be inappropriate to impose monetary or administrative sanctions in this matter."* This from CSR-4839-L to "*Nothing in the Communications Act of 1934, as amended, nor the 1992 Cable Act, provides for recovery of costs*

associated with the filing of a petition for relief with the Commission relating to the statutory leased access provisions or the Commission's leased access regulations. Accordingly, The Firm's request for compensation for such costs and revenues will be denied." This from CSR-4749-L; to "*Neither the Communications Act of 1934, as amended, the 1984 Act, nor the 1992 Act provide for recovery of costs associated with the filing of a petition for relief with the Commission for alleged violations of the leased access statutory provisions or of the Commission's regulations issued under authority of those statutory provisions."*

But while FCC consistently refuses to penalize errant cable operators let's look at this from a 1998 New Orleans Times Picayune news item. It states, *"The FCC also decided to let aggrieved parties collect damages in cases where a company knowingly and willfully violates FCC rules.)* LAPA questions why FCC can't do the same for leased access users when cable sites knowingly and willfully violate FCC rules.

The leased access user should be able to make use of any technically feasible method to deliver its programming to the cable company headend/program playback location. This of course would be at the leased access users' expense or at extra charge only if the cable company provided equipment <u>not provided</u> any non-leased user whether accepting delivery via satellite, 'off-the-air' broadcast, fiber, coaxial, 'DVD or other playback device. Leased access users

should be able to provide its programming live (via satellite, IPTV, microwave, coaxial, fiber optic cable or other means employed by any non-leased programmer) or on a delayed basis using video automation equipment, that can be remotely fed by the internet/microwave/wireless means. The leased access user should also be allowed to handle the scheduling of its' own programming if so desired. In other words, the cable company should not unduly restrict how the leased access programmer provides its programming to the cable company.

The leased access user should be able to take advantage of new technology, such as the inactive programming guides and video on demand channels. The leased access user should also have access to these or other new technology that would affect the distribution or promotion of its programming. *(It has been the sad experience of many if not all leased access users to be unable to even get the local cable site to provide the user with a schedule of other programming on the designated leased access channel.)*

The leased access user should also not be subjected to "unfair" competition from the cable companies which operate local origination channels or video on demand services, "such as video classifieds". *(Cox Cable in New Orleans forced a leased access user to accept placement on a digital tier while continuing to have their own direct competitor local origination channel on*

the basic analog tier. Cox even has an additional three analog channels labeled as 'local programming' in the channel lineup for the site.) The cable company should not unduly restrict programming which may be in competition with them or demand exclusivity to any programming.

Here is an excerpt from the petition regarding this Cox episode:

COX and Tier placement and March 6, 2007 petition

Excerpted from the petition: *"Ms. Higginbotham also advised me that Cox had been planning to start a Real Estate Channel in New Orleans, but that they could not launch in New Orleans now because we were going to. She also advised that they had just gotten their Real Estate Channel up and running in Baton Rouge, Louisiana, within the last several weeks. (We had advised Ms. Chaissignac during our initial meeting with her of our intent to broadcast in New Orleans initially, and expand to Baton Rouge and out of state.)"*

Cox, New Orleans has long had locally produced content on their local origination, channel 10. TV Guide also shows Cox channels 75,76 and 78 as 'local access programming". Cox's own 'channel guide' at http://www.cox.com/louisiana/cable/channel_lineup.asp shows the same lineup and Cox's digital channel lineup shows the channel they name on the leased access agreement StogMedia has with them as 'leased access', channel 198 to

be 'Real Estate'. Of course this was the name of the operator that filed the petition previously referred to in these comments.

The Leased Access Producers Association encourages the Commission to consider all of these matters and adopt rules that give leased access users, a fair chance to succeed. It has long been the mantra of the cable industry when involved in franchise negotiations and/or faced with competition from the likes of Verizon and AT&T for a 'level playing field'. We beseech FCC to have cable provide that same 'level playing field' to leased access users. Let's look at some remarks by Chairman Martin regarding a 'level playing field'. While speaking at at Georgetown University McDonough School of Business's Center for Business and Public Policy, November 30, 2006; he said, "*The Commission should focus on creating a regulatory environment that promotes investment and competition, setting the rules of the road so that players can compete on a level playing field."*

Another area that begs to be addressed is 'certificates of run'. Cable operators provide these to ad insert and 'local origination' clients yet refuse to provide these to leased access users. Not only do the operators do so, they include in their 'adhesion documents' language that states they are only responsible to repay leased access users for the 'time' when a site does not have the user's show on in the designated time. FCC has repeatedly upheld this operator

position yet a leased access programmer's loss is not limited to the airtime. They nearly always have advertisers who have been cheated from begin seen and these actions make it difficult to create a credible 'ID' for a programmer. FCC must adopt stringent rules providing for leased access users to secure damages equal to losses in events such as this.

Additionally FCC needs to require cable sites to publish a schedule of programming on designated leased access channels or at least have one available when requested.

Leased Access was touted in the past by the likes of Matt York, publisher or Videomaker magazine as a vehicle for videographers, to sustain a business providing TV programming of value to the public. Many users or potential users of leased access have become discouraged and gave up due to the roadblocks, obstructions and red tape of the cable companies, who for some reason or another, do not want to be bothered with leased access. The Commission should develop a primer for cable companies to educate them on leased access and their obligations and also for the potential or current leased access user as well. Leased Access Producers Association believes in the potential of leased access and encourages an environment where it can thrive.

In closing LAPA would like to point out that in NEWSReport No. DC 96-25 it stated:

At that time, the Commission also adopted requirements concerning other leased access issues and stated that these rules were a starting point that would be refined through the rulemaking process and as issues were addressed on a case-by-case basis. LAPA suggests FCC simply instruct the staff to review the dozens of 'petitions for relief' to determine which 'issues' need to be refined. There have been cases where FCC's imposition of simple procedural matters have resulted in dismissing valid issues raised by the petitioner and never examined the basis of the filing of the petition. LAPA believes that had the FCC staff simply fully investigated any number of these petitions the rules would have long ago been refined.

On the topic of 'procedural' matters, here are some comments by Cole, Raywid & Braverman, LLP, Washington attorneys engaged in FCC matters, wrote, *"The FCC's* ***procedural rulings in these cases are helpful to the cable industry****, as they provide some protection against untimely and unsupported complaints. In particular, the FCC rejected two complaints as untimely, because they were filed well after 60 days from the date of the alleged violation. The FCC further noted that it would not consider commercial leased access complaints that were not supported by relevant documentation or affidavit as required by the FCC's rules."* ***(emphasis added)***

LAPA's question is: What does the date of filing have to do with whether or not the issue is valid; did the cable company act in the manner alleged in the petition? And, where are the 'rules' regarding 'relevant documentation or affidavit'. Exactly where are these rules in published form and what do they specifically state?

LAPA requests that during the interim while the Commission is reviewing and studying comments they instruct the staff to at least act on existing petitions. One involving Cox at New Orleans has now lingered for about six months. Cox is still profiting from local airtime sales while the Leased Access petitioner is 'out of business'.

Respectfully submitted,
Charles H. Stogner
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